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No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROY CLIFFINGER, J. MADISON POMEROY, AND CARMI TIMES PUBLISHING COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND WHITE COUNTY BRIDGE COMMISSION, EX REL. UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	3
Argument	5
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Alexander v. *Hillman*, 296 U.S. 222	7
Darlington v. *Turner*, 202, U.S. 195	7
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439	6
Hunter v. *United States*, 5 Pet. 173	7
Smith v. *Orton*, 21 How 241	7
United States v. *American Bell Telephone Company*, 128 U.S. 315	6
United States v. *California*, 332 U.S. 19	6
United States v. *Republic Steel Corp.*, Oct. Term, 1959, No. 56, May 16, 1960	6
Statute and Rule:	
Act of April 12, 1941, P.L. 37, 55 Stat. 140	2, 3, 6
Section 5	3
Section 7	4
Section 8	4
Section 12	4, 7
Federal Rule of Civil Procedure:	
Rule 38	2, 7

558784—60—1

Miscellaneous:

Report of the Select Committee to Conduct an Investigation of the White County Bridge Commission, House Report No. 2052, 84th Cong., 2d Sess. (1956), made pursuant to H. Res. 244 of the same Congress..... Page 8

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois (Pet. App. 17–21) is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 22–31) is reported at 275 F. 2d 529. The opinion of the court below denying rehearing (Pet. App. 32–35) is reported at 275 F. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1960. A timely petition for rehearing was denied on March 21, 1960. The petition for a

writ of certiorari was filed on June 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States has standing to enforce the fiduciary obligations imposed by an Act of Congress upon officials charged with the duty of operating an interstate instrumentality known as the White County Bridge.

2. Whether the court of appeals, which reinstated the complaint following a dismissal by the district court, erroneously ruled that the action is an equitable one and that a trial by jury will not be constitutionally required.

3. Whether the court of appeals, in upholding the sufficiency of the complaint to state a cause of action, relied upon extraneous material.

STATUTES AND RULES INVOLVED

The Act of April 12, 1941, P.L. 37, 55 Stat. 140, is set forth at Pet. App. 34–44.

Federal Rules of Civil Procedure, Rule 38, provides:

* * * * *

> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> * * * * *
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it

as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATEMENT

The White County Bridge Commission was created by Congress as a corporate body politic and was authorized to acquire, maintain and operate a bridge spanning the Wabash River and connecting Illinois and Indiana. Act of April 12, 1941, P.L. 37, 55 Stat. 140.[1] Under the Act, the Commission is to establish tolls "so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintaining, repairing, and operating the bridge and its approaches under economical management, and to provide a sinking fund sufficient to pay the principal and interest" on the authorized bond issue.

"All tolls and other revenues from said bridge are * * * pledged to such uses." The Commission is directed to keep accurate records of receipts and expenditures (Section 5, Pet. App. 38). After the bonds are fully paid, or after a sinking fund sufficient for such payment is accumulated, the Commission is to turn the bridge over to the States of Indiana and Illinois for toll-free operation. Any assets of the Commission then remaining are to be divided equally between the two States. If Indiana and Illinois refuse to accept the bridge, the Commission is to continue its operation and maintenance with the tolls

[1] The Act is reprinted in full at Pet. App. 34–44.

adjusted to provide only enough revenue for this purpose (Sections 7, 8, Pet. App. 39–41).

The Commission is empowered, *inter alia,* to contract, to sue and be sued, and to complain and defend in all courts of law and equity. The statute named the three original members of the Commission and required each to qualify by filing with the Federal Works Administrator an oath to perform faithfully the duties imposed by the Act (Section 8, Pet. App. 40–41).

The statutory provisions "may be enforced or the violation thereof prevented by mandamus, injunction, or other appropriate remedy brought by the attorney general for the State of Illinois, the attorney general for the State of Indiana, or the United States district attorney for any district in which the bridge may be located in part, in any court having competent jurisdiction of the subject matter and of the parties" (Section 12, Pet. App. 43).

The present action was instituted by the United States in its own name and by the Commission *ex relatione* the United States (App., *infra,* p. 9). The complaint,[2] in the portions now relevant, alleged that funds of the Commission were appropriated to the personal use of Commissioner Pomeroy, Commission Manager Clippinger,[3] and the Carmi Times Publish-

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[2] The complaint was amended three times before its dismissal by the district court. References to the complaint relate to the complaint in its final form (App. *infra,* pp. 9–12).

[3] The caption refers to Mr. Clippinger as both Manager and Commissioner (R. 4a). The body of the complaint refers

ing Company, and sought recovery to the extent that the defendants had been unjustly enriched by the diversion. It also sought such further relief as might be appropriate to deal with the misconduct and mismanagement alleged.

The district court dismissed the complaint, holding that the United States did not have sufficient interest to bring suit in its own name and had not been authorized to sue on behalf of the Commission.

The court of appeals reversed, holding that under Section 12 of P.L. 37 the United States had standing to protect the rights of "that section of the public which has equitable interests in the assets of the Commission since it has been designated by Congress as the intended ultimate owner of the bridge and of any funds remaining in the hands of the Commission at the termination of its existence" (Pet. 27).

The court ruled further that the allegations of the complaint, if proved, would warrant injunctive relief as well as restitution; that the action was equitable in nature; and that, accordingly, a trial by jury would not be constitutionally required.

ARGUMENT

1. Petitioners raise a question (although they do not argue the point) as to the standing of the United States to institute this proceeding. However, even in the absence of express statutory authorization, the United States has very broad authority "to institute and conduct litigation in order to establish and safe-

to Mr. Clippinger only as a Commissioner (App., *infra*, p. 10). Mr. Clippinger, in an affidavit to the district court, averred that he is not now and never has been a Commissioner (R. 13a).

guard government rights and properties," *United States* v. *California*; 332 U.S. 19, 27. Here, the United States has an obligation to the public at large to assure use of the interstate bridge facility upon the terms contemplated by the congressional enactment. Under Public Law 37, tolls are to be reduced as soon as the outstanding bonds are paid off. If the bridge commissioners divert or misuse the tolls collected, the burden on the public to pay tolls is to that extent enlarged. "The essence of the right of the United States to interfere in the present case is its obligation to protect the public" (*United States* v. *American Bell Telephone Company*, 128 U.S. 315, 367) from injuries which will fall upon the public if, as alleged, there has been malfeasance in the administration of the trust which Congress, in the exercise of the commerce power, has imposed upon the bridge commissioners.[4] In addition, the United States has an interest of its own to protect. It has a subsisting residual interest in the bridge property, which may ultimately revert to the United States in the event (far from unlikely) that Illinois and Indiana should decline to assume the obligation of operating and maintaining the instrumentality.

Finally, this is not a case in which the action was instituted without express statutory authorization.

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[4] See *United States* v. *Republic Steel Corp.*, Oct. Term, 1959, No. 56, May 16, 1960, requiring restoration of channel depth by a company which, without authorization, deposited solids in waters of the United States. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, sustaining the right of the State of Georgia to institute an action, *parens patriae*, to protect its citizens against discriminations in railroad rates.

Section 12 provides that the United States Attorney may pursue appropriate remedies to enforce provisions of Public Law 37 and to restrain violations. There can be no question that this contemplates the institution of suits by or on behalf of the United States.

2. Petitioners complain that the court of appeals regards the action as an equitable one and that the consequence may be to deprive them of a jury trial in the district court. To begin with, this question is premature. A demand for jury trial must be made in the district court (Rule 38, *supra*, p. 2), and no demand has yet been made. Moreover, even if the district court should conclude that the action is equitable and that there is accordingly no *right* of trial by jury, it might nonetheless impanel a jury and abide by its factual determinations.

We also believe that the court of appeals correctly concluded that the complaint was broad enough to justify injunctive relief and that restitution might be required as an incident to such relief. And, the possibility of injunctive relief apart, we believe that the monetary claim advanced in this case is in the nature of an equitable action for an accounting, rather than a suit at law. The commissioners are fiduciaries. The United States is asserting equitable interests—its own and those of the public. The gravamen of the complaint is a breach of trust.[5]

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[5] See *Alexander* v. *Hillman*, 296 U.S. 222; *Darlington* v. *Turner*, 202 U.S. 195; *Smith* v. *Orton*, 21 How. 241; *Hunter* v. *United States*, 5 Pet. 173.

3. Petitioners also contend that the court of appeals improperly considered a congressional report—a report based on investigation of the bridge commission[8]—"in aid of the complaint" (Pet. 2). This is a misreading of the opinion below. The court of appeals did not refer to the congressional investigation of commission derelictions because it concluded that the complaint, standing alone, was deficient. Rather, it referred to details set forth in the report in order to illustrate its point that proof developed at the trial might demonstrate with particularity the need for a broad decree, *i.e.*, a decree which would not merely require restitution, but would also prevent mismanagement and misconduct in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
SHERMAN L. COHN,
Attorneys.

JULY 1960.

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[8] Report of the Select Committee to Conduct an Investigation of the White County Bridge Commission, House Report No. 2052, 84th Cong., 2d Sess. (1956), made pursuant to H. Res. 244 of the same Congress.

APPENDIX

[CAPTION OMITTED]

Third Amended Complaint

Plaintiff, United States of America, by C. M. Raemer, United States Attorney, hereby amends the original Complaint filed herein on July 6, 1957, as amended on November 15, 1957, and as amended on March 24, 1958, by striking all of the paragraphs of said complaint with its amendments and substituting therefor, as follows:

COUNT I

1. This is a civil action brought by the United States of America, as plaintiff, and brought on behalf of the White County Bridge Commission (herein Commission) to recover funds collected by the Commission and by certain former and present commissioners thereof, and misapplied by the defendants.

2. This court has jurisdiction of this cause pursuant to the provisions of 28 U.S.C. 1345, and of Public Law 37, 77th Cong., Act of April 12, 1941.

3. The White County Bridge Commission was established by Public Law 37, 77th Cong. (Act of April 12, 1941) (herein the Act), a copy of which is attached as Exhibit A, which authorized the Commission to acquire, maintain and operate a bridge and approaches thereto across the Wabash River at or near the City of New Harmony, Indiana.

4. The defendants Roy Clippinger, J. Madison Pomeroy, Lenna A. Kern, Administrator of the Estate of Julius C. Kern all reside at Carmi in the Eastern District of Illinois and within the jurisdiction of this Court, and the

defendant Carmi Times Publishing Company, an Illinois Corporation, has its offices and principal place of business at Carmi, in the Eastern District of Illinois, also within the jurisdiction of this Court.

5. At all times mentioned herein, Roy Clippinger, J. Madison Pomeroy and Julius C. Kern were Commissioners of the White County Bridge Commission.

6. The Act authorized the Commission to fix and charge tolls for transit over such bridge and provided that in fixing the rates of toll to be charged for the use of such bridge the same should be so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintaining, repairing, and operating the bridge and its approaches under economical management.

7. The Act required that all tolls and other revenues from said bridge be pledged to pay for the cost of maintaining, repairing and operating the bridge under economical management.

8. The Act required that the Commissioners and their successors should file with the Federal Works Administrator an oath that they would faithfully perform the duties imposed upon them by the Act.

9. During the course of operation of the bridge from June 19, 1941, to the present time, defendants breached a fiduciary duty in that they failed to maintain, repair, and operate the bridge under economical management in that at least $69,101.74 of tolls collected were not properly used for the maintenance, repair or operation of the bridge but were used for improper and wrongful purposes for the benefit of the private interests of all of the defendants. Such improper use is partially set forth in Exhibit B to the Complaint and made a part hereof.

10. The defendants, by their failure to utilize properly the tolls collected and by their improper and wrongful expenditures, have diverted at least $69,101.74 and have been wrongfully and unjustly enriched in the amount of at least $69,101.74.

11. As a result of the failure by defendants to utilize properly and manage economically the tolls collected, and as a result of defendant's wrongful and unjust enrichment, the White County Bridge Commission has been deprived of at least $69,101.74 which sum would otherwise be available to the White County Bridge Commission for the purpose of repair and maintenance of the bridge.

COUNT II

12. Defendant J. Madison Pomeroy is at present, a member of the White County Bridge Commission and was a member of the Commission at all times mentioned herein.

13. The wrongful expenditures referred to in Count I, above, were partially the result of Pomeroy's breach of duty in that he did not faithfully perform the duties imposed upon him by the Act, but rather knowingly allowed such wrongful expenditures.

14. Defendant Pomeroy was unjustly enriched by the wrongful expenditures of the Commission's funds.

15. By thus breaching his fiduciary duty defendant Pomeroy has shown that he is incapable of performing his duties as a commissioner.

WHEREFORE, the United States of America demands judgment against the defendants, and on behalf of and for the account of the White County Bridge Commission, for funds wrongfully diverted from the maintenance, repair and operation of the bridge in the amount of at least $69,101.74, plus interest and costs of this action; and for the removal of defendant

Commissioner J. Madison Pomeroy from the White County Bridge Commission, and for the appointment of a successor Commissioner as the Court shall direct, plus any other relief this Court may deem just and proper.

/s/ C. M. RAEMER,
United States Attorney.

EXHIBIT B TO THIRD AMENDED COMPLAINT

Recapitulation of Ascertainable Financial Detriment to the Commission and Corresponding Benefit to Roy Clippinger's Interests and to the Benefit of the Carmi Times Publishing Company, an Illinois Corporation

On 2,000 $6 ticket books in 1951	$78.13
On 77,000 ticket books in 1952	5,055.09
On commission employees working for the Carmi Times: 5-year period	40,000.00
On 555,000 pamphlets	12,000.00
On Shrine circus tickets	1,225.80
On receipt slips	6,000.00
On Clippinger's Hot Springs trip, wife's portion	146.82
On Clippinger's trip to Tucson to see a commission employee	550.57
On Clippinger's trip to St. Petersburg, Fla., to see Judge Kern	500.29
On Clippinger's trip to Chicago for drafting a bill for Congress	148.07
On Clippinger's trip to San Francisco:	
Wife's part of railroad fare	247.08
Wife's expenses	335.22
On Clippinger's and other commissioners' railroad fare to Boston, Mass.:	
Account their wives' portion of fare	986.70
Account wives' expense	825.82
On payment of insurance on Times' car	105.45
On office decoration	476.70
On typewriter used by Carmi Times	420.00
Total	69,101.74